IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 59 OF 2007

M/s. Ashwin Corporation. ... Petitioner.

V/s.

Indian Power Service Ltd.
(Now known as ISPL Industries Ltd.) ... Respondents.

Mr. G.B. Kedia for the Petitioner.
Mr. Ashish Kamath i/b. Kartikeya & Associates for the Respondents.

CORAM : DR. D.Y. CHANDRACHUD, J.

14TH JUNE, 2007.

P.C. :-

1. The claim in the Company Petition for winding up is for goods sold, supplied and delivered. The total outstanding dues are stated to be in the amount of Rs.22,50,227/-.

2. A reply has been filed by the Respondent setting out that;

(i) The Petitioner has elected the remedy of a Civil Suit before the District Court at Bhavnagar and since the suit is rip for trial, the exercise of the jurisdiction in winding up

should not be resorted to;

(ii) The material that was supplied by the Petitiioner was defective resulting in a blast at the factory of the Respondent. Damages were sustained by the Respondent upon which a debit note dated 12th April 2005 was raised;

(iii) The company is a solvent company, with a turnover of Rs.36.81 crores in the year 2005-2006 and nearly 700 workers are employed;

(iv) There was a running account between the parties which would show that the Company was prompt in making payment of its dues and the claim of the Petitioner which was not paid was on the ground that the material was defective and as a result of which damage was sustained.

2. On the other hand it has been urged on behalf of the Petitioner in rejoinder that the debit note on which reliance has been placed by the Respondent has never been served on the Petitioner.

3. Having heard Counsel appearing on behalf of the Petitioner and the Respondent, I am of the view that the exercise of the jurisdiction in the proceedings for winding up is not warranted in the facts of this case. Undoubtedly, the mere institution of a Civil Suit is no bar to the exercise of the jurisdiction for winding up. However, it is an admitted position that some time in the year 2006, the Petitioner has moved the Court of competent jurisdiction viz. the District Court at Bhavnagar for the recovery of the very claim of Rs.22.50 lakhs which forms the subject matter of the present proceedings. The defence of the company that there was a running account between the parties is evidenced by Exhibit 'B' to the reply which shows that payments were made from time to time by the company. The case of the company that it is solvent, with a turnover of Rs.36.81 crores and the dues which have been claimed by the Petitioner have been withheld on the ground that the goods that were supplied were defective. Undoubtedly, one of the submissions of the Petitioner is that the alleged debit note of the Respondent dated 12th April

2005 raising a claim was not served on the Petitioner. However, it would neither be appropriate nor proper for this Court in the exercise of its jurisdiction under Sections 433 and 434 of the Companies Act, 1956 to enter upon disputed question of fact which have been raised as between the parties. In that context, this Court is of the view that in the facts and circumstances of the case, the Petitioner should be relegated to establishing its claim in the forum to which recourse has already been taken for ascertaining the entitlement of the Petitioner and the liability, if any, of the Respondent.

4. The Company petition is accordingly dismissed. However, it would warrant a clarification, ex-abundanti cautela that the observations in the present order are in the context of a Petition for winding up and shall not come up in the way of the trial of the suit.